

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOMMY S. MARKS,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

No. CV-12-0538-RHW

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS, ENTERING
JUDGMENT, AND CLOSING FILE**

Before the Court, without oral argument, is Defendant State of Washington's Motion to Dismiss, ECF No. 4, filed on October 4, 2012. For the reasons set forth below, the motion to dismiss is granted. Plaintiff has failed to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), and in the alternative, failed to respond or comply with LR 7.1(e), despite clear warnings by the Court.

BACKGROUND

On September 7, 2012, Plaintiff Tommy S. Marks filed a *pro se* complaint in the Superior Court of Washington, County of Spokane. Notice of Removal, ECF No. 1. On September 20, 2012 the above-captioned matter was removed to the Eastern District of Washington by Defendant. *Id.* at 1. The following day, the case was reassigned to this Court. ECF No. 3.

Plaintiff alleges that Defendant violated his civil rights through its city, county, and state law enforcement agencies. Complaint, ECF No. 1 at 6-7. Beginning in 1991, Plaintiff alleges harassment due to his American Gypsy culture. *Id.* In addition Plaintiff stated claims for assault, battery, slander, libel,

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1 reckless endangerment, harassment, intimidation, negligence, gross negligence,
2 abuse of authority, child abuse, interference with parental and custodial authority,
3 reckless infliction of emotional distress, tortious conduct, and outrageous conduct.
4 *Id.* at 7.

5 On October 4, 2012 Defendant filed a motion to dismiss for failure to state a
6 claim and supporting documentation. ECF Nos. 4-8. Upon Defendant's request, the
7 Court provided *pro se* warnings to Plaintiff, which advised him of the relevant
8 court requirements and local rules affecting disposition of this case. *See* Order
9 Advising Plaintiff of Court Requirements and Setting Briefing Schedule, ECF No.
10 9. The Court also directed the Clerk's office to provide Plaintiff with the Notice to
11 *Pro Se* Litigants of the Dismissal and/or Summary Judgment Rule Requirements,
12 ECF No. 10. Despite these warnings, Plaintiff did not respond to the instant
13 motion.

14 LEGAL STANDARD

15 The purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim
16 is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732
17 (9th Cir. 2001). "[T]he issue is not whether a plaintiff will ultimately prevail but
18 whether the claimant is entitled to offer evidence to support the claims." *Gilligan v.*
19 *Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quoting *Scheuer v. Rhodes*,
20 416 U.S. 232, 236 (1974)).

21 To avoid a Rule 12(b)(6) dismissal, a complaint must plead "enough facts to
22 state a claim to relief that is plausible on its face." *Clemens v. DaimlerChrysler*
23 *Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*,
24 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff
25 pleads factual content that allows the court to draw the reasonable inference that
26 the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,
27 678 (2009). Although detailed factual allegations are not required, the factual

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1 allegations “must be enough to raise a right to relief above the speculative level.”
 2 *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be accepted as
 3 true and all reasonable inferences that may be drawn from the allegations must be
 4 construed in the light most favorable to the nonmoving party. *Broam v. Bogan*, 320
 5 F.3d 1023, 1028 (9th Cir. 2003). Although the Court construes *pro se* pleadings
 6 liberally, a complaint may be dismissed for failure to state a claim if it appears
 7 beyond doubt that the plaintiff can prove no set of facts in support of his claim
 8 which would entitle him to relief. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976);
 9 *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1982).

10 If the court grants a motion to dismiss a complaint, it must then decide
 11 whether to grant leave to amend. The court should freely give leave to amend when
 12 there is no “undue delay, bad faith or dilatory motive on the part of the movant, . . .
 13 undue prejudice to the opposing party by virtue of allowance of the amendment,
 14 [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also*
 15 Fed. R. Civ. P. 15(a). Generally, leave to amend is only denied when it is clear that
 16 the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow*
 17 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

18 DISCUSSION

19 Defendant argues that Plaintiff fails to state a claim upon which relief can be
 20 granted under Rule 12(b)(6). The Court agrees. Plaintiff fails to articulate any legal
 21 basis or allege any facts establishing how the State of Washington committed a
 22 tortious act under federal or state law or otherwise violated any of Plaintiff’s rights.
 23 Plaintiff has asserted only conclusory allegations of harassment. *See Jones v.*
 24 *Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (noting
 25 conclusory allegations unsupported by facts are insufficient to state a claim under
 26 42 U.S.C. § 1983). For example, the only facts asserted by Plaintiff are that state
 27 and local law enforcement harassed him by “cons[ta]ntly pulling me over and
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1 sending me tickets in the mail . . .” As such, Plaintiff fails to state a claim against
2 Defendant upon which relief may be granted.

3 Defendant also contends that Plaintiff’s various state law claims must be
4 dismissed because he failed to file a statutory tort claim with the State of
5 Washington prior to commencing this action. Under Washington law, “[n]o action
6 subject to the claim filing requirements of RCW 4.92.100 shall be commenced
7 against the state . . . for damages arising out of tortious conduct until . . . the claim
8 is presented to the risk management division. Wash. Rev. Code 4.92.110; *Jones v.*
9 *Univ. of Washington*, 62 Wn. App. 653, 660 (1991). Defendant proffers the
10 Declaration of John Scott Blonien, which states that Plaintiff has not filed a tort
11 claim with the state Office of Financial Management. Blonien Decl., ECF No. 8. In
12 addition to this deficiency, Plaintiff has not provided any plausibly plead facts
13 suggesting that Defendant is liable for the misconduct alleged. Thus, Plaintiff’s
14 state law claims are dismissed as well.

15 Moreover, Defendant State of Washington enjoys sovereign immunity from
16 a suit for damages in this Court. *See Kimel v. Florida Board of Regents*, 528 U.S.
17 62, 73 (2000) (absent consent, the Eleventh Amendment bars suits for damages
18 against a state); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65–71 (1989)
19 (Eleventh Amendment bars suits brought under 42 U.S.C. § 1983 against states and
20 state officials acting in their official capacity);

21 Finally, the Court dismisses the complaint in its entirety because Plaintiff
22 failed to comply with Local Rule 7.1(e)¹. The “[f]ailure to follow a district court's
23 local rules is a proper ground for dismissal.” *Ghazali v. Moran*, 46 F.3d 52, 53 (9th
24 Cir. 1995). Despite two separate warnings by the Court, the Plaintiff has failed to
25 file a response to the motion to dismiss, and therefore, is deemed to consent to the

26 ¹ Under LR 7.1(e), “[a] failure to timely file a memorandum . . . in support of or in opposition to
27 any motion may be considered by the Court as consent on the part of the party failing to file . . .
28 to the entry of an Order adverse to the party in default.”

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1 granting of the motion. See ECF Nos. 9-10. Accordingly, the Court grants the
2 motion to dismiss on this alternative ground.

3 CONCLUSION

4 For the foregoing reasons, the Defendant's motion to dismiss is granted
5 without leave to amend. Typically the Court would grant Plaintiff leave to remedy
6 these pleading deficiencies. *See* Fed. R. Civ. P. 15(a) (specifying that, when justice
7 requires, leave to amend is be freely given). However, because Plaintiff failed to
8 respond to Defendant's dismissal motion, and is considered to have agreed to this
9 lawsuit's dismissal, the Court declines to grant leave to amend as a matter of
10 judicial economy.

11 Accordingly, **IT IS HEREBY ORDERED:**

- 12 1. Defendant's Motion to Dismiss, ECF No. 4, is **GRANTED**.
- 13 2. **Judgment** is to be entered in Defendant's favor, without prejudice.
- 14 3. All pending hearings and deadlines are **STRICKEN**.
- 15 4. This file shall be **CLOSED**.

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
17 Order and forward copies to Plaintiff and counsel.

18 **DATED** this 9th day of January, 2013.

19
20 *s/Robert H. Whaley*
21 ROBERT H. WHALEY
22 Senior United States District Judge
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